DATED: FEB 22 1988
CASE NO: 88-TLC-6

IN THE MATTER OF

MIDLAND LIVESTOCK CO.
8 SHEEPHERDERS

ORDER OF DISMISSAL

This matter arises pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. Section 1101 et seq. The regulations promulgated thereunder by the Secretary of Labor relating to the processing of temporary labor certification applications are set forth at 20 C.F.R. Section 655 et seq.

Petitioner, Midland Livestock Company, timely requested an administrative-judicial review of the February 1, 1987 decision of a Department of Labor Regional Administrator to deny temporary alien labor certification for three job opportunities.

Under the Act, a petitioner for H-2A workers must apply to the Secretary of Labor for certification that (1) there are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (2) the employment of the temporary worker will not adversely affect the wages and working conditions of workers in the United States similarly employed. 20 C.F.R. Section 655.90(b)(A) and (B). In addition, an employer who intends to employ an alien temporarily must submit, as part of his application, documentation which clearly satisfies the requirements of 20 C.F.R. Sections 655.101-103. Full compliance with these requirements is the minimum necessary to demonstrate that an employer has by reasonable means made a good faith effort to test the availability of U.S. workers, and to recruit U. S. workers who are willing to work at the prevailing wages offered and accept the working conditions of the job opportunity.

Statement of the Case

In the instant matter, the Regional Administrator found that the requirements set forth at 20 C.F.R. Section 655.106 had not been fully satisfied. Specifically, the Regional Administrator held that a sufficient number of able, willing and qualified U. S. workers had been identified who were available at the time and place needed to fill the three job opportunities for which certification had been requested. 20 C.F.R. Section 655.106(b)(l)(i).

The Regional Administrator found that three qualified workers referred to Employer by various job services called Employer's office but were told that they needed to speak directly with a Mr. Arambel. These applicants were rejected for employment after they failed to again

call Mr. Arambel. The Regional Administrator found that Employer made no attempt to contact the applicants or to re-contact the job service regarding these applicants.

The Regional Administrator determined that such a recruitment process had the effect of discouraging qualified individuals from applying for the positions offered. Finding that it could not, therefore, be determined whether the employment of H-2A temporary alien agricultural workers for the job opportunities would adversely affect the wages and working conditions of workers in the U. S. similarly employed, the Regional Administrator denied the temporary alien certification for three job opportunities for which certification was requested.

In its appeal, Petitioner argues that the denial of H-2A certification for the three sheepherders involved in the instant matter should be reversed. Petitioner asserts that its failure to contact the three U. S. applicants who applied for the job opportunities was not purposeful and that it had attempted to contact such applicants. The three applicants in question were G. Cisneros, Frank Abeyta and Jose Gutierrez. According to Employer, the Job Service did not have any record of Mr. Abeyta and did not have phone numbers for Mr. Gutierrez or Mr. Cisneros. The Job Service did not have an address ,for Mr. Cisneros other than general delivery. Mr. Cisneros and Mr. Abeyta had not left phone numbers or addresses with the Job Service and thus, Employer argues, there was no way for Mr. Arambel to contact them directly.

Mr. Gutierrez, according to Employer, never contacted Mr. Arambel directly, but had someone else call on his behalf. This person, according to Employer, was instructed to have Mr. Gutierrez call Mr. Arambel, which Mr. Gutierrez failed to do. An application for Mr. Gutierrez was sent to Employer by the Job Service, however. Employer attempted to contact Gutierrez' former employer, but could not reach him. Subsequent to the denial of labor certification, Mr. Arambel talked to Pierre Geraud who "knew of" Mr. Gutierrez. Geraud informed Employer that Gutierrez had worked intermittently for the former employer for the past 30 years, but had a poor employment history which included mental breakdowns and fights. Mr. Arambel bases its refusal to hire Mr. Gutierrez on the foregoing.

Employer argues that the Regional Administrator's denial of temporary alien labor certification should be reversed since Employer has demonstrated its good faith efforts to contact the U. S. applicants and has shown good reasons for its refusal to hire Mr. Gutierrez..

Discussion

Pursuant to 20 C.F.R. Section 656.112(a), the instant review consists solely of a consideration of the legal sufficiency of the record upon which the decision to deny temporary alien labor certification was based. In the instant matter, I find that the Regional Administrator acted totally within its discretion and in accordance with law in deciding not to grant Petitioner's applications for temporary alien labor certification for three H-2A workers.

The Regional Administrator is responsible for reviewing the contents of job offers and the applications for alien labor certification and ensuring that such comply with the applicable regulations. A significant part of the Regional Administrator's responsibility is to ensure that

employment of an H-2A worker will not have any adverse effect on the employment of available U. S. workers. Pursuant to 20 C.F.R. Section 656.106(b)(l), the Regional Administrator must count as available any U. S. worker who has applied to Employer, but who was rejected for other than lawful, job-related reasons. If the Regional Administrator determines that enough able, willing and qualified U. S. workers have been identified as being available to fill an employer's job opportunities it shall not grant temporary alien agricultural labor certification.

In the instant matter, the Regional Administrator denied certification based on its finding that three qualified U. S. workers were rejected by Employer for the job opportunities for other than lawful, job-related reasons, namely, their failure to re-contact Employer after an initial telephone call. The Job Service referred these three individuals to Employer as being able, willing and qualified applicants. As no interviews were conducted by Employer and, in fact, no further contact established, the Regional Administrator could not have found that the U. S. workers were not qualified or that Employer rejected the U. S. workers for lawful, job related reasons.

Employer's attempt to rebut the Regional Administrator's findings by showing that it could not reach the three applicants is insufficient to support a reversal of the Regional Administrator's findings. Employer has not adequately rebutted the Regional Administrator's finding that able, willing and qualified U. S. workers were available to fill Employer's job opportunities. In addition, Employer's recruitment efforts regarding the U. S. workers were inadequate to establish the unavailability of the U. S. workers. Mr. Arambel interpreted the applicants' failure to call him a second time as their being not interested in the job opportunities. As the burden is on Employer, however, to recruit U. S. workers and to reject them for only lawful, job-related reasons, the Employer's recruitment efforts should have been more substantial and designed to more fully test the availability and qualifications of U. S. workers. I agree with the Regional Administrator in finding that Employer should have used all means avail-able to it to contact the U. S. workers who had expressed interest in the job opportunities, including but not limited to contacting the appropriate Job Services or contacting the men through general mail delivery.

In the case of Mr. Gutierrez, Employer was in possession of his application from the Job Service, but Employer never contacted him, seemingly because Gutierrez' former employer could not be reached. Only subsequent to the denial of certification was Employer apprised of Mr. Gutierrez' allegedly poor work history.

In the instant matter, Employer has the burden of showing that it rejected the three U. S. workers referred to it for solely lawful, job-related reasons. Employer argues that it attempted but could not contact these applicants. Employer asserts that it has, therefore, complied with the regulations by rejecting the U. S. workers for lawful reasons. Employer's attempts to contact the U. S. workers referred to it, however, were inadequate to show a good faith effort on Employer's part. I must agree with the Regional Administrator's determination that Employer's inadequate attempts to contact the U. S. workers renders it impossible to determine whether Employer's subsequent rejection of such workers was for lawful, job related reasons. Pursuant to 20 C.F.R. Section 656.106(b)(l) such workers must be counted as available for the job opportunities.

It appearing that Employer in the instant matter rejected qualified U. S. workers for other than a lawful, job-related reasons, and has not made an adequate attempt to contact or interview the available U. S. applicants, I find that the Regional Administrator's denial of temporary alien labor certification for three H-2A workers is supported by the evidence and is in accordance with the applicable regulations.

ORDER

Accordingly, and in view of the foregoing, it is hereby ORDERED that the decision of the Regional Administrator to deny temporary alien labor certification for three H-2A workers is hereby AFFIRMED.

JOHN M. VITTONE
Deputy Chief Judge

Washington, D. C.
JMV/RAM/tt